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Telecommunications
84-0412

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

2/10/84 CIA has "no objection" to DOJ draft - per telecon w/ Branden Blum OMB

January 27, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: **LEGISLATIVE LIAISON OFFICER**

Department of Justice (CIA draft report only)
Central Intelligence Agency (Justice draft report only)
Department of the Treasury
Federal Communications Commission
General Services Administration
Department of Defense
Department of Commerce

RDP

SUBJECT: Justice and CIA draft reports on H.R. 424, the "Federal Privacy and Telephone Records Act"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than Friday, February 10, 1984.
NOTE: Similar reports on H.R. 933 (97th Congress) were circulated for comment on 4/30/81 and later cleared. GSA's report on H.R. 424 as cleared last year is also attached FYI.
Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: R. Veeder K. Wilson F. Fielding
C. Wirtz A. Donahue

Approved For Release 2008/09/18 : CIA-RDP86B00338R000200320008-9

Approved For Release 2008/09/18 : CIA-RDP86B00338R000200320008-9

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman, Committee on
Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice regarding a bill, H.R. 424, "to amend the Privacy Act of 1974 and the Communications Act of 1934 to provide for the protection of telephone records, and for other purposes."

SUMMARY OF BILL

The bill, which is identical to H.R. 933 in the 97th Congress, would restrict access of federal, State and local law enforcement officers to "telephone record information", a term broadly defined to encompass virtually every item of information pertaining to telephone communications except the content of the communications themselves. More specifically, the bill would restrict (1) access to telephone toll records, (2) use of pen registers which record numbers dialed from a particular telephone, (3) use of electronic means to trap and/or trace incoming calls to determine their origin, (4) access to unlisted telephone numbers, (5) cross-referencing of a telephone number to the name and address of the subscriber assigned that particular number, and (6) any other information needed to determine or verify the "existence, date, time, location or parties involved in any telephone call."

Following a statement of findings and purpose, the bill proposes to amend the Privacy Act of 1974 to establish special procedures for handling of "telephone record information" in the possession of federal departments and agencies. The measure then proposes to amend the Communications Act of 1934 to establish a new section 225 governing access to telephone record information in the possession of telephone companies. Subsection (a) of the new section sets out definitions; subsection (b) restricts disclosure of telephone record information to those forms of legal process authorized by subsection (c) or made pursuant to subscriber consent.

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Subsection (c) authorizes disclosures pursuant to court orders issued under the Foreign Intelligence Surveillance Act of 1978, court ordered responses to summonses or subpoenas described in subsection (d), or court orders entered under subsections (e) and (f). Subsection (d) requires advance notice to the subscriber of any subpoena or summons for "telephone record information" as well as an opportunity for the subscriber to challenge access in court. It is important to note that even if the subscriber chooses not to challenge a summons or subpoena, the court must affirmatively order a response to the legal process before disclosure can be made by the service provider. Furthermore, if a challenge is filed, paragraph (d)(2)(D) permits the subscriber to oppose the summons or subpoena "on any grounds which would otherwise be available if the customer were in possession of the information"; this implies that a criminal suspect could block law enforcement access to his telephone records on the Fifth Amendment ground that the records would tend to incriminate him. Subsections (e) and (f) set out procedures and requirements for court-ordered disclosures that are essentially identical to the existing requirements for a court order authorizing the interception of the contents of a telecommunication, 18 U.S.C. § 2510 et seq.

The bill also provides special procedures for Secret Service access to "telephone record information", authorizes civil damage actions for any violation (with liquidated damages of $10,000 provided for any improper disclosure), requires suppression of improperly obtained information in any trial or proceeding and establishes criminal penalties of a fine of up to $100,000 and/or imprisonment of up to five years for any intentional violation of the procedures of the bill.

EFFECT OF PROPOSAL UPON LAW ENFORCEMENT AND FOREIGN INTELLIGENCE

Our comments will focus mainly on those provisions of the bill restricting law enforcement access to telephone record information. In this regard, the bill would have a substantial adverse effect upon criminal law enforcement at the federal level, not to mention the equally significant impact on State and local prosecutions. The bill reflects a serious lack of appreciation as to the purposes served by and importance of telephone record information in criminal investigations.

First, telephone record information is frequently vital in connection with the investigation and prosecution of such priority federal offenses as narcotics trafficking, organized crime and racketeering, wire fraud and conspiracy as well as in the location and apprehension of fugitives. In a great percentage of such cases, perhaps a majority, only through access to telephone information is it possible to link drug traffickers to their suppliers and vendors, to establish connections between the members of organized crime syndicates, to prove federal jurisdic-

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tion over fraud and other criminal schemes, to ascertain the scope and composition of large-scale conspiracies, and to determine the whereabouts of fugitives. In short, any substantial curtailment of law enforcement access to telephone record information would seriously impede law enforcement efforts throughout the nation.

Second, the bill overlooks the fact that telephone record information is usually needed in the early stages of criminal investigations when any notice to the subject of the investigation could jeopardize the lives and safety of potential witnesses or result in flight from prosecution, tampering with evidence, subornation of perjury, fabrication of fraudulent "evidence" and cover stories and other illegal activities calculated to frustrate investigative efforts. Yet despite the serious threat that premature notice poses to criminal investigations, the bill affords no mechanism for delaying notice of a summons or subpoena.

The practical impact of this omission is to render administrative subpoenas and summonses as well as grand jury subpoenas (a constitutionally contemplated form of legal process) null and void in terms of access to telephone record information. As a consequence, the only procedure for obtaining telephone record information without notice is the cumbersome court-order mechanism. In this regard, the bill would impose upon access to telephone record information essentially the same highly restrictive procedures now required for interception of the contents of telecommunications. Yet the necessity of conducting an interception in a criminal investigation occurs very rarely whereas it is frequently necessary to seek some form of telephone record information. For example, only 258 interception orders (including extensions) were sought in connection with federal criminal investigations during calendar year 1982; during the same period, we estimate that the number of occasions upon which Department officials sought some form of telephone record information (toll records, unlisted telephone numbers, cross-referencing of telephone numbers to subscribers, and other information) was in excess of 100,000. Obviously, the proposed requirement of a

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court order for each such instance of access would tie up investigators and prosecutors in paperwork, flood the courts, significantly delay investigations and jeopardize prosecutions.1/

Furthermore, because telephone record information is normally needed in the early stages of an investigation, the demanding evidentiary standard required by the bill -- "reasonable cause" -- will bar access to telephone record information in most cases. In this regard, it should be borne in mind that the distinction between "reasonable cause" and "probable cause" is vague, at best, and that the "probable cause" standard is the same one required to support a criminal indictment, an event which occurs at the end of the investigative process. Obviously, such a standard can seldom be met at the early stages of an investigation. Without the leads obtained through telephone record information, many investigations would never progress to the point where an indictment or conviction could be secured.

H.R. 424 poses special problems for foreign intelligence. The bill provides an exception to its restrictions on government access to "telephone record information" for the disclosure or interception of telephone record information pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801 et seq.). However, while the exception is generally sufficient to

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1/ The various types of "telephone record information" are presently obtained by the Department of Justice in different ways: subscriber information (names and addresses of subscribers assigned particular numbers and unlisted numbers) is normally obtained pursuant to request; telephone toll records are normally sought pursuant to administrative or grand jury subpoena; and pen registers, traps and traces are normally effected through court orders issued pursuant to Rule 57(b) of the Federal Rules of Criminal Procedure. See Reporters Committee v. American Telephone and Telegraph, 593 F.2d 1030, 1038 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979), for telephone company policy regarding toll records. With respect to pen registers, the proposed Federal Criminal Code Revision (§6543 of H.R. 1647, 97th Congress) would have authorized entry of a court order for installation of a pen register upon a determination of "reason for the belief that the information likely to be obtained by the pen register is relevant to a legitimate criminal or civil investigation." A similar provision concerning the use of "call registers" is set forth in section 3113 of the Senate version of the proposed Criminal Code Reform bill (S. 1630, 97th Congress). Such a showing would seem to more nearly achieve a balance between the competing interests involved than the rigorous and cumbersome procedures set out at pages 10-16 of H.R. 424.

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protect activities conducted under that Act, it is too narrowly drawn to prevent serious damage to the government's ability to conduct foreign intelligence and foreign counterintelligence investigations.

For example, section 3 of the bill is not subject to the above exception; it requires telephone record information in the possession of a government agency to be returned "to the person who produced the record" either at the conclusion of the investigation or proceeding for which the information was collected or upon written demand when no proceeding is instituted within a reasonable time after the information has been collected. If "the person who produced the record" is interpreted to mean the telephone user, mandatory release of such information would jeopardize the methods and sources involved in foreign intelligence investigations.

In addition, the Foreign Intelligence Surveillance Act (FISA) does not apply to all types of telephone information described in the bill's definition of "telephone record information." Agencies with foreign intelligence investigatory authority would thus be required to follow the bill's procedures in order to obtain, for example, telephone toll records. Under these procedures, the individual whose records are being subpoenaed may challenge the subpoena. Again, disclosing to the subject of a subpoena that access to his or her telephone toll records has been requested by a government agency would effectively terminate any foreign intelligence or counterintelligence investigation of that person. Moreover, obtaining a court order requiring the disclosure of telephone record information pursuant to a summons or subpoena under proposed new section 225(d) of the Communications Act after a challenge by the customer would generally be impossible in the foreign intelligence area. Such a court order must be based on a finding that there are reasonable grounds to believe that the information will be relevant to a felony enumerated in section 225(e). A similar finding is required under the court-order procedures outlined in subsections (e) and (f) of new section 225. Because of the nature of foreign intelligence activities, this requirement that the information sought be relevant to the investigation of a felony would make it impossible for agencies which conduct foreign intelligence activities to use the bill's procedures to obtain telephone record information not subject to FISA. Thus, the bill's FISA exception is simply not broad enough to be meaningful for many foreign intelligence activities.

NEED FOR LEGISLATION QUESTIONABLE

The justification for such a severe restraint upon law enforcement has not been demonstrated. Despite the frequent use of telephone record information in criminal investigations, we are unaware of any instance of abuse of such information by law

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enforcement officials for political or other improper purposes.[2/] Indeed, the mere fact that telecommunications have occurred would seldom be subject to such abuse. By comparison, financial information, for example, often gives a clear view of the totality of a person's affairs including his income and assets, political and charitable contributions, organizational affiliations and many other aspects of his private life. Similarly, tax records provide a comprehensive view of a person's lifestyle; moreover, tax information is submitted pursuant to laws compelling the reporting of income. However, the mere fact of a telephone communication reveals very little about an individual's private life. Yet the subject bill proposes restrictions upon access to telephone record information more severe than those enacted to protect financial records (12 U.S.C. §§3401-3422) or tax records (26 U.S.C. §6103).

In fact, this bill seems to be based on a patently fallacious proposition: that the level of privacy interest in information establishing the fact of, date, time, and duration of a telecommunication can be equated with the level of privacy interest in the content of a communication. In this regard, we would note that "telephone record information" usually shows, at most, only that a call was placed from one telephone instrument to another -- not even the identities of the persons placing and receiving the call. Pen registers do not even record whether the call was completed, only that a given number was dialed. Moreover, the largest number of requests for "telephone record information" is for subscriber information reflecting only the name and address of the individual or business assigned a particular telephone number. However, even if telephone record information did disclose the identity of the originator and the recipient of the telecommunication, the level of privacy intrusiveness involved in disclosure of the fact of a communication between a person and his or her spouse, attorney, physician, clergyman or friend is hardly comparable to that involved in the content of the conversation.

Of course, the Department of Justice recognizes the obvious need for stringent protection of the contents of telecommunications; indeed, such communications have been held to be protected by the Fourth Amendment, Katz v. United States, 389 U.S. 347 (1967), and can only be intercepted upon entry of a court order satisfying the constitutional requirement of probable cause. The

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2/ The Department of Justice recognizes the sensitivity of telephone toll records pertaining to members of the news media, as indicated in regulations governing access to such records, Order No. 916-80, 28 CFR, Part 50.

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Approved For Release 2008/09/18 : CIA-RDP86B00338R000200320008-9

difference in reasonable expectation of privacy between the content of a telecommunication and telephone record information is as great as the difference between the privacy of a conversation occurring in a private home as compared with information, perhaps obtained from a neighbor, that a particular individual visited that residence at a specific date and time for a specific duration. There is, therefore, no comparable expectation of privacy in the fact of, date, time and duration of a telephone conversation -- information which is routinely recorded by telephone companies for billing purposes -- and such information is not, therefore, protected by the Fourth Amendment, Smith v. Maryland, 442 U.S. 735 (1979). Moreover, such individual privacy interests as do exist in telephone record information are clearly outweighed when there is a demonstrable reason to believe that access to telephone record information is necessary in connection with a legitimate criminal investigation or prosecution.

Finally, although the requirement of a court order to obtain telephone record information may not appear to the layman to be burdensome or disruptive, the conscientious preparation, submission and defense of an application for a court order, even an ex parte order, is an awkward process in the best of circumstances. This is especially true in the early stages of a criminal investigation when finesse and timing are of the greatest importance. Even ex parte applications increase the workload of investigators, prosecutors and courts and result in delays which can jeopardize important cases. Because prosecutorial and judicial resources are scarce, enactment of new laws imposing additional paperwork and litigation burdens upon the criminal justice system can only reduce the ability of that system to control crime. This bill, therefore, would have a harmful and unjustified impact upon law enforcement.

CONCLUSION

For the reasons set out above, the Department of Justice believes that H.R. 424 is unduly restrictive of law enforcement access to information and that laws governing interception of telecommunications are an inappropriate model for telephone record privacy legislation. Privacy legislation represents an area where individual privacy interests must be carefully balanced against the public interest in the proper administration of justice. In our view, the subject bill does not achieve a proper balance and would, in fact, deprive law enforcement officials of the information necessary to ascertain the facts that will enable the courts to see that justice is done.

The Department of Justice, therefore, recommends strenuously against enactment of H.R. 424.

Approved For Release 2008/09/18 : CIA-RDP86B00338R000200320008-9

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The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Approved For Release 2008/09/18 : CIA-RDP86B00338R000200320008-9